

DIVISION II

CA07-779

February 6, 2008

ALICE G. FRIEND
APPELLANT

AN APPEAL FROM POLK COUNTY
CIRCUIT COURT
[No. DR2005-0240]

v.

RAYMOND L. FRIEND
APPELLEE

HONORABLE JIM D. SPEARS,
CIRCUIT JUDGE

REMANDED

Alice Friend appeals from a divorce decree entered by the Polk County Circuit Court on April 16, 2007. She challenges the court's distribution of the parties' personal property. We remand for further proceedings consistent with this opinion.

The parties were married in 1964. At the time of their separation, they owned a home in Alabama and real property in Arkansas, including their primary residence in Shady. During the separation, Raymond received \$650 per month to rent his auto body shop. He also entered into contracts to sell two other parcels, receiving \$250 per month for one and \$550 per month for the other. The parties also owned a working interest in a natural-gas well. Their share of the production was sold through Sedna Energy, Inc. Between August 1, 2005, and December 31, 2006, Raymond received \$66,364.54 from Sedna. At trial, Raymond stipulated that he did not deposit \$25,139.56 of his royalty income in his bank account.

At trial, Alice took the position that all of the parties' valuable personal property remained at the residence in Shady with Raymond. According to Raymond, her valuation of the property left in his possession was significantly overstated. He estimated that the fair market value of the items in his possession was \$15,770 and that the property in Alice's possession was worth \$19,536. Alice also contended that Raymond kept a significant amount of gold and silver in the gun safe at his shop. At trial, he testified that, at one time, he owned \$40,000 to \$50,000 in gold but had sold it before the separation. On cross-examination, Alice introduced his October 30, 2006 deposition into evidence, wherein he testified that he could not recall having disposed of any gold and silver. The trial court ruled from the bench that Raymond would be bound by that answer.

Alice introduced the testimony of Diana Cagle, an accountant, who prepared the parties' tax returns from 1996 through 2003. She testified that, on at least five occasions between 1999 and 2000, Raymond purchased gold through her from a precious-metals company. She said that he ordered a minimum of 400 ounces of gold each time and 1400 ounces of silver on at least one occasion. She said that, once, when she delivered the gold to Raymond, he asked her not to tell Alice about it. She stated that, when he purchased the gold, it was selling at \$250 to \$300 an ounce; at the time of trial, it was selling at \$648 an ounce, and silver was selling at \$13 per ounce. She stated that Raymond had not reported a gain or loss on the sale of any gold in his tax returns.

In rebuttal, Raymond testified that he had never bought silver from Diana but may have purchased up to 250 ounces of gold. He said that he had disposed of the gold at the

price that he bought it. Alice's attorney then confronted him with his deposition testimony, in which he admitted that he had 26 ounces of gold and 100 ounces of silver in his possession and that he had not sold any of it. Raymond conceded at trial that he had disposed of \$200,000 from his bank account in 2005 by giving four of his friends \$50,000 cashier's checks. This money was deposited in the registry of the court after Alice discovered what he had done.

From the bench, the trial judge stated that he found the proof insufficient to show that Raymond had hoarded any gold or silver and said that he would equally divide the assets that were in existence at the time the divorce was filed in September 2005. In the decree, he equally divided the existing property. He directed the parties to accept a \$400,000 offer of sale on the house in Alabama and said that Raymond would be credited with all payments he had made that reduced the principal. The trial judge awarded Alice one-half of the gold and silver in Raymond's possession; the Sedna investment; the money held in the registry of the court; the income on the two contracts for deed; and the net proceeds of the sale of the Arkansas real estate. He awarded Alice all cash and personal property then in her possession and the sum of \$12,569.78 as her one-half interest in the money that Raymond received during the separation and for which he could make no accounting. To Raymond, the trial judge awarded the corresponding one-half interests in the property set forth above, as well as all cash then in his possession, his IRA, and all motor vehicles in his name. The parties were held equally responsible for the debts in their joint names and individually liable for any indebtedness incurred after the filing of the complaint. The trial judge also awarded

certain items of personal property, primarily furniture and household items, that were in Raymond's possession to Alice. Alice then filed this appeal.

Alice argues on appeal that the trial court's findings of fact concerning certain items of personal property were clearly erroneous because they were based upon Raymond's testimony, which could not be believed. She asserts that Raymond was uncooperative in answering discovery, in testifying during his deposition, and in providing an accounting of all marital income received during the separation. She challenges the division of property as to the following items: (1) the income Raymond received during the separation; (2) the personal property in Raymond's possession; and (3) the gold and silver.

I. Income received by Raymond during the separation

Alice points out that, during the pendency of the divorce, it was undisputed that Raymond received \$66,364.54 from the Sedna working interest; \$650 per month in rental income on the shop; \$250 per month on a contract of sale; and \$550 per month on another contract of sale. When instructed to account for all monies expended from this income during the separation, Raymond simply submitted copies of his bank statements and Defendant's Exhibit 5, entitled "Sedna Income Accounting," which stated:

2005	-	Aug Thru Nov = 6 Trips To Alabama RE: Divorce
2006	-	Jan Thru May = 5 Trips To Alabama Jan - 4th - 9th - Court Feb - 1st - 6th - Lawyer Visit Feb - 19th - 24th - Lawyer Visit Apr - 1st - 6th - Court May - 27th - 31st - Lawyer Visit

05-06 - Live In Granddaughter That Alice Ran off From Alabama.
16 yrs old, 10th grade.

Raymond testified at trial that he spent most of the undeposited money on his trips to Alabama while the parties were litigating jurisdiction.

According to Alice, Raymond received \$89,564 during the pendency of this action. She points out that, at trial, the trial judge stated that he intended to award her one-half of the income he received, less payments that he made on the Alabama property. At trial, Raymond testified that he had paid \$12,480 in interest only on the Alabama property; when that amount is subtracted from \$89,564, the remainder is \$77,084. Alice contends that, instead of \$12,569.78, she is entitled to \$35,542, giving Raymond credit for \$3000 in temporary support. She notes that, other than the Alabama house payments, Raymond did not testify about any other joint marital expenses. She argues that this division of the marital income received during the pendency of the divorce was inequitable.

On appeal, divorce cases are reviewed de novo. *Farrell v. Farrell*, 365 Ark. 465, 231 S.W.3d 619 (2006). With respect to the division of property, we review the trial court's findings of fact and affirm them unless they are clearly erroneous or against the preponderance of the evidence. *Id.* We give due deference to the trial court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.* As the finder of fact, it is within the trial court's province to believe or disbelieve the testimony of any witness. *Found. Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000).

Arkansas Code Annotated section 9-12-315(a)(1) (Repl. 2002) provides that all marital property shall be distributed equally unless the court finds such a division to be inequitable; in that event, the court shall make some other division that the court deems equitable, taking into consideration certain enumerated factors, and stating in the order its reasons for not dividing the marital property equally. Section 9-12-315 does not compel mathematical precision in the distribution of property but simply requires that marital property be distributed equitably. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). The statute vests the trial judge with a measure of flexibility and broad powers in apportioning property, nonmarital as well as marital, in order to achieve an equitable distribution; the critical inquiry is how the total assets are divided. *Id.* We will not substitute our judgment on appeal as to the exact interest each party should have but will only decide whether the order is clearly wrong. *Id.*

In the decree, Raymond was only charged with the \$25,139.56 in royalty income that he did not deposit; thus, the trial judge did not charge him with his living expenses, as he had indicated from the bench that he would. It is true that a trial judge can change his mind before he enters a decree. *See Morrell v. Morrell*, 48 Ark. App. 54, 889 S.W.2d 772 (1994). The judge, however, did not explain how he arrived at this amount, and the record lacks sufficient evidence for us to understand his reasoning. Raymond's "accounting" listed no amounts of money for his claimed expenses; without explanation, his bank statements added little. Therefore, we remand this case for the trial judge to make findings explaining his division of the income Raymond received during the separation.

II. The tangible personal property

In her next point, Alice argues that the list of items on Plaintiff's Exhibit 3 was an incomplete list of the personal property at the marital residence, which she was not permitted to enter after August 2005. She contends that this exhibit was also incomplete because it did not include any property located at the parties' other real property. Alice asked at trial if she could take an inventory of the personal property at the residence, and the trial judge stated that he would give the parties an opportunity to reach an agreement about these items. She states that, before the divorce decree was entered, the parties failed to reach an agreement. Alice also argues that the items of property on Plaintiff's Exhibit 3 were not equal in value. She says that, while Raymond received tractors; farm equipment; vehicles; guns; and tools, she received household items of significantly less value. She asks us to reverse and remand so that an appropriate inventory can be taken and an equitable division be made, preferably by agreement of the parties and, if not, by judicial sale.

We need not decide this issue. On remand, the trial judge can reconsider it in relation to his total disposition of the parties' property.

III. Gold and silver

Alice further challenges the trial judge's acceptance of Raymond's testimony about the gold and silver. At trial, the court stated: "I'm also going to rule that the proof is insufficient to show that Mr. Friend is hoarding any gold or silver, and so again, we're dealing with what was in existence that has been proven in September of '05." The court also stated that Raymond was bound by his deposition testimony, in which he admitted that he

possessed 26 ounces of gold and 100 ounces of silver. The divorce decree provided that each party would receive one-half of the gold and silver in Raymond's possession. Therefore, the decree indicates that each party is to receive 13 ounces of gold and 50 ounces of silver.

In his brief, however, Raymond denies having any gold or silver. He states: "The trial court specifically ruled that the proof was insufficient to show that Mr. Friend was hording [sic] any gold or silver. . . . Nevertheless, Mrs. Friend was awarded one half of any gold and silver which was in the possession of Mr. Friend which, according to his testimony was none." This statement seems to be at odds with the testimony and the court's rulings. Therefore, on remand, the court is directed to make clear findings as to the amount of gold and silver possessed by Raymond and the amount that is to be awarded to each party.

We remand for further proceedings consistent with this opinion.

Remanded.

HART and HEFFLEY, JJ., agree.